ROBERTS, RECEIVER, ET AL. *v.* NEW YORK CITY ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 546. Argued April 2, 3, 1935.—Decided April 29, 1935.

1. In condemnation proceedings, as in lawsuits generally, the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. P. 277.
2. A mere underestimate of the compensation to be paid for property taken in condemnation will not characterize the proceeding, otherwise fair, as wanting due process; the error must be gross and obvious. P. 277.
3. The City of New York condemned and removed a spur of an elevated railway system, which, in operation, was no longer of value to the business and which had been found by state authority to be no longer a public convenience and necessity and to have become an obstruction to the public use of the street in which it stood. The state courts in determining damages, which were assessed against the owners of the abutting lots, allowed the company nothing on account of its franchise or its easement to use the street, and only the scrap value of the demolished structure. For so-called easements—i. e. the right to obstruct or impair each abutter's easements of light, air and access—which by the law of New York the Company had been obliged to acquire by purchase or condemnation as a condition to lawful erection and operation of the spur, the award was the amount judicially determined to be their value when the rights were acquired from the abutters years before—an amount much less than would be the cost of acquiring them anew, in changed conditions. *Held:*

   (1) Whatever the precise classification of the rights acquired from abutting owners, they are not separable from the franchise; and it can not be said that the state courts infringed the constitutional limitation, or even that they erred as a matter of law, in valuing them at no more than their original cost. P. 281.

   (2) It was not arbitrary or unreasonable, upon the evidence, to value the structure as scrap (since the value of the "easements" could be realized only by abandoning the spur), and to allow nothing on account of the railway's corporate franchise or its public easement in the street. P. 284.

4. Damages in condemnation are measured by the loss to the owner, not by the gain to the taker. P. 282.

265 N. Y. 170; 192 N. E. 188, affirmed.

CERTIORARI, 293 U. S. 554, to review a judgment sustaining an assessment of damages for the taking in condemnation by the City of a spur forming part of the elevated railway system of the Manhattan Railway Company. Reports of the earlier proceedings in the State Supreme Court at trial term and in the Appellate Division will be found in: 126 Misc. 879; 141 *id.* 565; 143 *id.* 129; 229 App. Div. 617; 238 *id.* 832.

Mr. Charles E. Hughes, Jr., with whom *Messrs. E. Myron Bull, Carl M. Owen, J. Osgood Nichols, Harold C. McCollom, Martin A. Schenck, Charles Franklin*, and *George Welwood Murray* were on the brief, for petitioners.

The decree below arbitrarily measured compensation by the value of the easements at the time of their acquisition by the railroad, rather than as of the time of the taking, and ignored the availability of this property for sale or for uses for other than railroad purposes.

That which the railroad acquired from the abutting owners was "an interest in real estate," an "easement."

The Federal Constitution requires that in condemnation, compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof. *Olson* v. *United States*, 292 U. S. 246.

The value of these private easements has always been judicially recognized to be the difference between the value of the abutting property when subject to the railroad's easements and its value when not so subject. *Pappenheim* v. *Metropolitan Elevated Ry. Co.*, 128 N. Y. 436, 449; *Matter of Brooklyn Union Elevated R. Co.*, 113 App. Div. 817, aff'd, 188 N. Y. 553; *Muhlker* v. *New*

York & Harlem R. Co., 197 U. S. 544, 571. This was the basis of the opinions of market value given by the undisputed testimony of the railroad's expert at the trial.

Even if the operation of the spur had been unprofitable, to limit consideration to the railroad's use of the property and ignore its availability for other uses or for sale, was a violation of the constitutional guaranty. *Olson* v. *United States*, 292 U. S. 246, 255, 256; *Boom Co.* v. *Patterson*, 98 U. S. 403, 408; *Goodin* v. *Cincinnati & Whitewater Canal Co.*, 18 Oh. St. 169, 181; *City & South London Ry. Co. and The Rector*, [1903] 2 K. B. 728; [1905] 1 A. C. 1; *Great Falls Mfg. Co.* v. *United States*, 16 Ct. Cls. 160, 198–199; aff'd, 112 U. S. 645. Distinguishing: *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195.

What the owner lost was property which has always been valued in relation to the abutting property. It so happens that the abutting property gains the equivalent. But an award measured by the difference between the value of the abutting property when subject to the railroad's easement and its value when not so subject would be in no sense measuring the compensation by what the taker gained rather than by what the owner lost. It would be the natural method of recognizing availability to the owner for a valuable use. This was its recognizable fair market value at and prior to the time of condemnation and it was precisely what the railroad would have had to pay in order to acquire the same property at the date of condemnation. See *In re East Galer Street*, 47 Wash. 603.

Of course the railroad could not have released the easements and still have continued to operate. But the railroad could have realized the value of the easements by an agreement made prior to, and as a condition of, the release.

This conception of the availability of these easements for sale to the abutting owners was by no means speculative; nor does it infringe the rule that the value to be

ascertained does not include "any element resulting subsequently to or because of the taking." *Olson* v. *United States*, 292 U. S. 246, 256. On the contrary, this availability existed prior to the condemnation and was taken away by the condemnation.

Section 237 of the New York Railroad Law gave to the railroad the right to abandon any portion of its right subject to the approval of the Public Service Commission. This obviously made possible a negotiation with the abutting property owners. It would have been entirely competent for the railroad company to go to the property owners and offer in effect to sell these private easements back to them.

The views of the public authorities on the desirability of restoring the street to unimpeded street uses make it reasonably certain that such approval would have been forthcoming. The relatively small number of abutting owners, and their active desire to secure the removal of the spur, satisfy every requirement of practicability of such a disposition.

This proceeding in fact was one whereby, at the instance of the abutting property owners, the structure was removed and the easements were restored to them, a part of the cost being imposed upon them.

The plan of the statutes and the action taken thereunder were such as to constitute the abutting owners, or the city as an intermediary, the 'willing purchaser' assumed in determining fair market value. A negotiated sale was feasible also under the statutes involved.

The statutes effected exactly the result which was intended, namely, that the properties, including the easements, should be taken, the easements and other benefits restored to the property owners, the cost imposed upon them, and the compensation fixed by the court, if it could not be arrived at by agreement. This plan was such as to provide for compensation based, as in the case

of any other property, on the fair market value between willing seller and willing purchaser at the time of vesting of title. Apart from our argument that the easements were prior to the condemnation available for disposition to the abutting property owners, the condemnation statutes themselves contemplated full compensation regardless of limitations, if any, arising from railroad use. *Matter of Ninth Avenue and Fifteenth Street,* 45 N. Y. 729, 732–5; *In re The City & South London Ry. Co. and The Rector,* [1903] 2 K. B. 728; [1905] 1 A. C. 1. See also *Brooklyn Park Comm'rs* v. *Armstrong,* 45 N. Y. 234.

Whether it be considered that the City took the easements directly for the purpose of what might be termed a resale, or whether it be considered that the City took them in reality as intermediary for the abutting owners, it is certain that the City took this form of property possessed by the Railway Company, which had a clearly available use and a clearly and readily ascertainable market value; and that unless the Railway Company shall be paid for what was thus transferred to the property owners, the result—contrary to the clear intention of the Legislature—will be to do what the law has always prohibited; that is, to "take the private property of one individual, without his consent, and give it to another." *New York & Oswego M. R. R. Co.* v. *Van Horn,* 57 N. Y. 473, 477; see also, *Matter of the Mayor of New York,* 186 N. Y. 237, 246. Distinguishing: *Heard* v. *Brooklyn,* 60 N. Y. 242.

There was no abandonment. The railroad could not have been compelled to abandon.

The easements were taken in perpetuity by the railroad and paid for on that basis, and there was no diminution of such payment by reason of the possibility of a reverter. *Hudson & Manhattan R. Co.* v. *Wendell,* 193 N. Y. 166, 179; *Miner* v. *New York Central & H. R. R. Co.,* 123

N. Y. 242; *New Mexico* v. *United States Trust Co.*, 172 U. S. 171.

Due process of law was denied by the judgment that only junk value should be paid for the railway structure, which had been found to be suitable and well adapted to its purpose, and that no compensation should be made for the railroad's franchise and rights in the street.

The railroad consistently opposed the removal of the spur.

The franchise was terminated only by this very condemnation. It is a strange doctrine that a structure which at the time of condemnation was properly in the street will be given only a nuisance value because by the consummation of the proceeding its maintenance became unlawful.

There has in fact never been any finding that the spur was an unprofitable venture. It produced an operating loss; but it was a part of a system operated at a profit. Even considered by itself, the spur was no inconsiderable property. Its use was increasing and was greater than in many earlier years.

The protection against confiscation by eminent domain of the whole category of properties not profitable in and of themselves, but provided under franchise requirements by railway and other public service corporations in response to public demand, is involved in the determination in this case that the structure, franchise and public easements may be taken without substantial compensation.

Where, as in the present case, the structure is found to be suitable and well adapted for its purpose, and used as part of a plant, so-called structural value, or the cost of reproduction less depreciation, is an important element which must be taken into consideration in ascertaining its value in condemnation.

The structure when taken was real estate. It was error to value it as detached junked personalty.

The acceptance of the franchise and the building of the structure under its requirement constituted a contract between the State and the railroad which was property protected by the Constitution.

A franchise "can no more be taken without compensation than can . . . tangible corporeal property." *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 329. Compensation may not be measured by regarding only the income produced by the spur considered by itself. It was an integral part of the profitably operated Third Avenue Line. The railroad under the City's grant acquired, as against the City, the right to occupy with its columns, station approaches and so forth, valuable street space.

Whether these public easements were of so distinct a nature that they should have been separately valued, or were, as the lower courts have held, so inseparable from the franchise that it and they must be considered as a single entity, they could not, we submit, be taken wholly without compensation.

Mr. Paxton Blair, with whom *Mr. Joseph F. Mulqueen, Jr.,* was on the brief, for the City of New York, respondent.

The failure of the railroad to appeal from the decision of the Public Service Commission disentitles it to relief in this Court. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 230; *Gorham Mfg. Co.* v. *State Tax Comm'n,* 266 U. S. 265, 269–270.

Under the doctrine of *Heard* v. *Brooklyn,* 60 N. Y. 242, the easements acquired by the railroad reverted automatically to the abutting owners when the operation of the railroad ceased. See also, *Drucker* v. *Manhattan Ry. Co.,* 213 N. Y. 543.

The theory of unjust enrichment may not be invoked to justify an increase in the awards.

MAP OF

NEW JERSEY - DELAWARE BOUNDARY

IN

DELAWARE RIVER & DELAWARE BAY

TO ACCOMPANY

THE DECREE OF THE SUPREME COURT OF THE UNITED STATES

BEING A COMPOSITE MAP COMBINING AND REDUCING U.S.C.& G.S. CHARTS 294, 295 (SEPT. 1933) AND 1218 (AUG. 1932) TO SHOW BOUNDARY BETWEEN NEW JERSEY AND DELAWARE SETTLED BY THE FINAL DECREE OF THE SUPREME COURT OF THE UNITED STATES - PURSUANT TO THE OPINION OF THE COURT REPORTED IN 291 U.S. 361.

NAUTICAL MILES

YARDS

MARCH 30, 1935.

INGRAHAM & SLEEPER, ENGINEERS.
501 COOPER STREET CAMDEN, N.J.

PENNSYLVANIA
DELAWARE

BEGINNING POINT

REFERENCE MONUMENT NO.1

LOW WATER LINE

REFERENCE MONUMENT NO.2

REFERENCE MONUMENT NO.3

REFERENCE MONUMENT NO.4

BOUNDARY

REFERENCE MONUMENT NO.5 - ON THE BOUNDARY

TURNING PT. NO.9

TURNING PT. NO.10

TURNING PT. NO.11

TURNING PT. NO.12

BRIDGETON

COHANSEY RIVER

MILLVILLE

MAURICE RIVER COVE

DOVER

CAUTION

SOUNDINGS IN FEET
AT MEAN LOW WATER

In contending that the easements for which the railway company paid valuable consideration in the years 1888–1904 were taken at the time of the condemnation of the 42nd Street Spur, the petitioners appear to have lost sight of the distinction between the "taking" of a piece of property, and the termination of an incorporeal right. Cf. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 508. See also, *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89, 95.

The "most advantageous use" doctrine has no application to an elevated spur which under the law can be used for but a single purpose. *Olson* v. *United States,* 292 U. S. 246, 255; *Boom Co.* v. *Patterson,* 98 U. S. 403, 408; *Matter of City of New York (Blackwell's Island Bridge Case),* 198 N. Y. 84, 87.

Mr. Wm. D. Mitchell, with whom *Messrs. Albert S. Wright* and *Ellwood Thomas* were on the brief, for Robert Walton Goelet et al., respondents.

In a condemnation case from a state court reaching this Court on the claim of denial of due process, the function of this Court is not to act as a court of appeal and error. It will not substitute its judgment for that of the state courts on disputed questions of fact or debatable questions of law. Notwithstanding the state courts may have committed errors of law or fact, or applied erroneous principles of valuation, if the record, as in this case, contains all the evidence proffered by the claimants, this Court should not hold that due process has been denied, unless on the whole record it concludes the award does not approximate fair compensation computed on correct principles. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 246; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 565; *Appleby* v. *Buffalo,* 221 U. S. 524; *McGovern* v. *New York City,* 229 U. S. 363, 370; *Seattle, R. & S. Ry. Co.* v. *Washington ex rel. Linhoff,* 231 U. S. 568;

O'Neill v. *Leamer*, 239 U. S. 244, 249; *Olson* v. *United States*, 292 U. S. 246, 259, note 3; *Los Angeles Gas & Electric Corp.* v. *Railroad Comm'n*, 289 U. S. 287, 304; *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 79.

As the spur was found by the state tribunals, on abundant evidence, to be no longer a public convenience, and to have permanently ceased to produce enough revenue for the system of which it was a part to pay the cost of operation, and had ceased to have any value for railway purposes, the reproduction cost basis of valuation must be discarded. This leaves two possible theories of value:

One eliminates the so-called nuisance value, or "market value" arising from the possibility of exacting a price from the owners of abutting property for demolition. On this basis the value of the spur is limited to the scrap value of the structure, as the franchise, and so-called easements acquired from the abutting owners, expire with the abandonment of the spur.

The other theory includes such value as can be ascribed to the easements in the hands of the company, through possibility of sale to the abutting owners. This nuisance theory has not been sanctioned by any court. In this case it leads to the conclusion that the spur increased in value to a fantastic sum by virtue of the fact that its obsolescence for railway purposes placed the owners in a position to sell out to the abutting owners.

Assuming that possibility of sale to abutters must be considered, this record, containing all the proffered evidence on the point, does not warrant a finding that the true value of the easements exceeded the award.

The facts are such that a possibility of sale to abutting owners was wholly fanciful. The "market" was limited to a group whose agreement on price and apportionment among themselves was required and is shown to have been

impracticable. The property owners believed and insisted that the company was not entitled to be paid for the easements. Forcing unification of the property owners as buyers, through the City's power to levy assessments, may not be considered in ascertaining market value.

In a contest of endurance between the company, losing money in operation of the spur, and property owners suffering from it, the latter were in a better strategical position. At least one may only speculate as to which would first succumb. Only a speculative basis exists for a guess as to what, if anything, the property owners would have paid. On the whole record no one can say that it would have been more than the award. *McGovern* v. *New York*, 229 U. S. 363, 372; *New York* v. *Sage*, 239 U. S. 57; *Appleby* v. *Buffalo*, 221 U. S. 524; *Olson* v. *United States*, 292 U. S. 246.

No arbitrary rule was applied to the prejudice of the company. The New York courts did not hold as a matter of law that adjudicated value of the easements at the time of acquisition was the sole measure. The Appellate Division concluded first that this adjudicated value was the least which could be accepted. This was to the advantage of the company. It then examined the whole record to ascertain if a larger value should be awarded, and held that only a speculative basis for a larger value was shown. The Court of Appeals merely held on the whole record that the amount awarded was fair. The New York courts received and considered all evidence proffered by the petitioners on every theory they saw fit to urge.

On any theory of valuation open on this record, the franchise had no value and the structure only a scrap value. If the nuisance theory of possible sale to abutting owners be accepted, the award of that value presupposes a demolition of the structure. Rejecting the nuisance value, and considering the spur as valueless for operation, the result is the same.

Mr. Wm. H. Page, with whom *Mr. Richard M. Page* was on the brief, for Bowman Biltmore Hotels Cor. et al., respondents.

Petitioners are not entitled to any compensation for the rights to impair the abutting property owners' easements of light, air and access or for the franchise to construct, maintain and operate the spur because (1) there was no "taking" of said rights and franchise in the constitutional sense; (2) said rights and franchise were worthless because the spur was being operated at a loss; (3) the award therefor is in contravention of the rule laid down in *Muhlker* v. *New York & Harlem R. Co.,* 197 U. S. 544; and (4) said rights and franchise were acquired for railway purposes only under the authority of the Rapid Transit Act of 1875 which in effect limited their duration to such period of time as their exercise might be a matter of public convenience and necessity.

Messrs. Frank C. Laughlin and *Spotswood D. Bowers* submitted for Corn Exchange Bank, respondent.

The so-called easements were extinguished upon the removal of the spur, and any rights the claimants had reverted to the property owners, who then held their easements of light, air and access in their full integrity.

There is no warrant, in fact or law, for any award whatsoever to the claimants for these so-called easements.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The 42nd Street spur of the elevated railroad system in the City of New York has been condemned for the purpose of demolition in proceedings duly instituted by officials of the city government. The fee owner of the spur, a receiver, a lessee, and trustees under mortgages are dissatisfied with the award of damages. The question is whether property interests have been taken without

compensation in violation of the restraints of the Fourteenth Amendment.

The length of the demolished structure was about nine hundred feet. At the east it was connected with the elevated station at 42nd Street and Third Avenue. At the west it had a terminal on Park Avenue opposite the Grand Central Station. For a number of years traffic upon the spur had been dwindling, especially so since the completion of the subways, receipts being less than the cost of operation. Traffic became so light that the spur ceased to contribute value to the business of the railroad, either as an independent unit or as a feeder to the system. With these developments a movement to take the structure from the highway acquired rapid headway. Travelers on 42nd Street, afoot or in vehicles, were impatient of obstructions that had ceased to be useful. Lot owners, contiguous to the railway and nearby, looked forward with eagerness to the removal of an unsightly edifice in the expectation of enhancing the value of their lots. The city too had an interest in the growth of taxable values as well as in the promotion of the safety of the streets. In 1919, the legislature of New York came to the relief of city, lot owners and travelers through the adoption of a statute. By Chapter 611 of the Laws of 1919, the Public Service Commission was empowered to determine whether the spur and its appurtenances were "necessary and convenient for the public service, or whether, even if necessary and convenient, such tracks, structure, station and appurtenances" constituted "an impediment or obstruction to the public street." Upon the certificate of the Commission as to the existence of either of these conditions, the city might condemn "the rights, easements and franchises of the said Manhattan Railway Company" through appropriate proceedings. See also L. 1923, c. 635.

At the end of a full hearing the Public Service Commission found and certified that the spur was no longer a public convenience and necessity, and also that it was an impediment and obstruction to the public use of the street. No appeal to the courts was taken by the company. Thereupon, the City of New York by its Board of Estimate and Apportionment resolved that condemnation proceedings should be begun. The resolution, adopted November 23, 1923, called for the condemnation of the structure of the spur and of all easements and franchises appurtenant thereto, title to vest in the city on December 7 of that year. The resolution was followed by a suit under the applicable statute for the determination of the damages to be paid to the owners of the property condemned. The trial court made an award in the sum of $975,438, with interest, stating the component items in an opinion. 126 Misc. (N. Y.) 879; 216 N. Y. S. 2. Cross-appeals followed to the Appellate Division of the Supreme Court, the city and abutting lot owners insisting that the award was too high, and the spur owner and its allies insisting that the damages were too low and that property had been taken without due process of law. *United States Constitution, Fourteenth Amendment.* Three items were in controversy: (1) the value of the franchise; (2) the value of the structure; and (3) the value of certain rights or privileges characterized as private easements. As to item (1), the ruling of the Appellate Division was that the franchise was without value, and had become a source of loss instead of gain; as to item (2), the ruling was that the structure was without value beyond what it would be worth as scrap when taken down; and as to item (3), the ruling was that the private easements must be paid for at not less than their value as judicially determined at the time of their acquisition, but that the evidence did not justify a finding that their value was any greater. *Matter of City of New York*

(*Manhattan Railway Co.*), 229 App. Div. 617; 243 N. Y. S. 665. The cause was remitted to the trial court, which heard additional evidence and made a new decree. As a result of that decree the value of the private easements was fixed at $539,117.41; the scrap value of the structure was fixed at $235; the value of the franchise nothing. 143 Misc. (N. Y.) 129; 257 N. Y. S. 37. There were cross-appeals to the Appellate Division, which affirmed without opinion (238 App. Div. 832; 262 N. Y. S. 973), and then to the Court of Appeals, where there was an affirmance by a divided court. 265 N. Y. 170; 192 N. E. 188. This court granted a writ of certiorari at the instance of the Receiver of the railway company and those allied with him in interest. 293 U. S. 554.

A statute of New York in force at the taking of the spur directs the court to "ascertain and estimate the compensation which ought justly to be made by the City of New York to the respective owners of the real property to be acquired." Charter of New York City, § 1001; L. 1915, c. 606. Cf. L. 1923, c. 635. Such a system of condemnation is at least fair upon its face. "If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages." *McGovern* v. *New York City*, 229 U. S. 363, 370. Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1)*, 294 U. S. 63, 70. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. The test has been differently phrased by different judges and in different contexts. At times we find the statement that the

Constitution is not infringed unless there has been "absolute disregard" of the right of the owner to be paid for what is taken. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 246; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 565; *Appleby* v. *Buffalo,* 221 U. S. 524, 532. At other times we are told that due process is not lacking unless "plain rights" have been ignored, with a reminder that much will be overlooked when there is nothing of unfairness or partiality in the course of the proceedings. *McGovern* v. *New York City, supra,* at p. 373. From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences of degree too subtle to be catalogued. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355; *Klein* v. *Board of Supervisors,* 282 U. S. 19, 23. Cf. *Davidson* v. *New Orleans,* 96 U. S. 97, 104. One cannot hope to mark its bearings in a sentence or a paragraph. Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. "It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment." *Seattle, R. & S. Ry. Co.* v. *Linhoff,* 231 U. S. 568, 570.

In the setting of this background we approach the consideration of the rulings that are here assigned as error.

1. First in importance is the appraisal of the private easements.

The franchise to maintain an elevated railway "with an interest in the street in perpetuity" (*People* v. *O'Brien,* 111 N. Y. 1, 38; 18 N. E. 692) dates from September 7, 1875. After the building of the road controversies developed between the company and abutting

owners. Out of them grew what came to be known as the elevated railroad lawsuits, "one of the most important and interesting chapters in the history of litigation" in New York. *Powers* v. *Manhattan Ry. Co.*, 120 N. Y. 178, 183; 24 N. E. 295. The foundation stone was laid by the Court of Appeals in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, decided in 1882. The doctrine was there announced that appurtenant to lots abutting on a highway are certain private easements—easements of light and air and access—which may not be destroyed or impaired through the construction under legislative sanction of an elevated railroad without payment to the lot owners of the damage to their land and buildings. Many later cases enforced the same doctrine and indeed enlarged its scope, applying it to lots where the fee of the highway was vested in the city. *Lahr* v. *Metropolitan Elevated Ry. Co.*, 104 N. Y. 268; 10 N. E. 528; *Kane* v. *New York Elevated R. Co.*, 125 N. Y. 164; 26 N. E. 278. Cf. *Muhlker* v. *N. Y. & H. R. Co.*, 197 U. S. 544; *Sauer* v. *New York City*, 206 U. S. 536. In submission to these holdings the Manhattan Railway Company extinguished the damage claims of lot owners along many miles of track. It did this by purchase or condemnation or proceedings equivalent thereto, the amount to be paid being determined sometimes by a court, sometimes by agreement. Generally the extinguishment took the form of grants of the easements to the extent that they were affected by the then existing structure, the abutting owners being the grantors and the Manhattan the grantee. Irrespective of the form, the substance of the transaction was that "the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property." Per Pound, Ch. J., in the present case, 265 N. Y. at p. 180. What was conveyed was the right to persist in a course of conduct that otherwise would have been a wrong.

Even then the process of condemnation or its equivalent did not so obliterate the easements as to leave abutters helpless in the face of new encroachments. If the user was substantially aggravated, as, for example, by an added tier of tracks, there was another right to be extinguished. *Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243; 79 N. E. 1015; *American Bank Note Co.* v. *New York Elevated R. Co.*, 129 N. Y. 252, 266; 29 N. E. 302. The company was under a continuing duty to rid its presence in the highway of the character of a trespass as against the title of abutters.

Whether these rights or interests, though easements in the ownership of the abutters, retained the same quality after release or conveyance to the railway, we do not now determine. They are spoken of in many cases as if their quality in the new ownership continued what it was before. See, e. g., *People ex rel. Manhattan Ry. Co.* v. *Barker*, 165 N. Y. 305; 59 N. E. 137, 151; *People ex rel. Manhattan Ry. Co.* v. *Woodbury*, 203 N. Y. 231; 96 N. E. 420. This may have been merely for convenience with the thought that the description was at least sufficiently accurate to serve the case at hand. Elsewhere the same interests are spoken of as "quasi-easements" (*American Bank Note Co.* v. *New York Elevated R. Co.*, *supra*, at p. 272) or by some other and equivalent term. *Matter of City of New York* (*Manhattan R. Co.*), 126 Misc. 879, 901; 216 N. Y. S. 2; 229 App. Div. 617, 625; 243 N. Y. S. 665; *Stevens* v. *New York Elevated R. Co.*, 130 N. Y. 95, 101; 28 N. E. 667. After acquisition by the railway, they are not susceptible of separation from the ownership of the franchise. *Kernochan* v. *New York Elevated R. Co.*, 128 N. Y. 559; 29 N. E. 65; *Drucker* v. *Manhattan Ry. Co.*, 213 N. Y. 543; 108 N. E. 74; *Heard* v. *Brooklyn*, 60 N. Y. 242.* They are not easements in gross assignable to strangers gen-

* Many decisions are collected in 40 Yale L. J. 779, 1074, 1309.

erally. 265 N. Y. at p. 181. They may be factors to be considered in determining the value of the franchise while the road is in operation, for they are effective as a release from liability for past or future damages. This is very far from saying that they contribute elements of value when operation has been proved to be impossible except at a continuing loss. Still less does it connote a value equivalent to the estimated present cost of condemning them anew.

We have said that there will be no attempt in this court to classify the rights acquired by the company as easements or as something else. For present purposes we accept the ruling of the state court that irrespective of their precise nature they had a value to be paid for upon the termination of the franchise and the removal of the structure by force of eminent domain. If all this be assumed, the petitioners fall short by a long interval of making out a defiance of constitutional restraints. Their argument, it seems, is this: property that is to be condemned must be paid for in accordance with the value at the time of the taking; these easements when acquired about half a century ago had a value then judicially determined of about half a million dollars; owing to changes in the neighborhood the same easements, if acquired in 1923, would have cost $3,600,000; an award has been made for the first amount only; the difference between the first amount and the second is an increment of value condemned without requital.

The argument misconceives the action of the courts below. The courts have not held that an increment of value in the easements or in anything else may be condemned without requital. What they have held is merely this, that there is no basis in the evidence for assigning any determinate value to the ownership of the easements in excess of the value belonging to them when they were acquired by the company. Even if there was error here

in the interpretation of the record, it was not so gross or obvious as to justify a holding that the restraints of the Constitution were forgotten or ignored. But in truth there was no error, or none to the prejudice of the owners of the property condemned. Much could be said in support of the position that the value of the so-called easements was nothing more than nominal. If so, the petitioners have been overpaid by more than half a million dollars. We do not go into that question now, for the city and the abutters are not petitioners in this court, and must acquiesce in the award as made. Problems open in the state court and there considered in the opinions (see especially the dissenting opinion in 265 N. Y. at p. 183) are beyond our jurisdiction here. Enough for present purposes that the award is not too low, though perhaps it is too high. Excess is not an error of which the owner may complain.

Too low it certainly is not. "The question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53. If we assume these easements to be property, what were they worth to the railway in 1923? The petitioners do not urge that it was practicable to find a buyer who would pay for the easements in connection with the franchise and with a view to continuing the operation of the road. The spur had proved to be a failure, a mere impediment to public travel. Substantial prices are not paid for the privilege of conducting a business at a loss. The petitioners do urge, however, that abutters would have been willing to pay for an abandonment of the road, and that such abandonment would have been equivalent to the surrender of the easements or to a deed of reconveyance. Voluntary abandonment was permissible (New York Railroad Law, § 237; also L. 1917, c. 788) until the franchise with its appurtenances was taken over by the city.

From this the conclusion is drawn that the easements are worth what the abutters would have paid for them. Implicit in such an argument are assumptions that would be worthy of scrutiny if the need for scrutiny were here. The inquiry would then be whether easements or quasi-easements inseparable from a franchise must be paid for as property at the peril of infringing the Fourteenth Amendment when their value for sale presupposes the abandonment of the franchise to which they are appurtenant. To carry the Amendment to that point approaches, though it may not touch, the acceptance of the nuisance value which Hough, J., on one occasion excluded from the reckoning with words of trenchant emphasis. *Consolidated Gas Co.* v. *New York City,* 157 Fed. 849, 874. For the time being and provisionally we put aside these doubts, resolving in favor of the company whatever problems they suggest Granting that the value of the easements is whatever abutters would have paid for a surrender of the franchise, how much would this have been?

A sale to abutters was impracticable unless all or nearly all united. One owner could gain nothing from a reconveyance of the easements appurtenant to his lot without a like reconveyance to others along the line of the invading structure. The spur would have to come down altogether or not at all. The notion is almost fantastic that there would have been union among the owners upon a price of $3,600,000 or any comparable figure. Even if the value of their lots were to be enhanced to that extent, they would be no better off as the outcome of the bargain than they already were without it, and would be risking a huge outlay. They would be doing this though they denied that the easements were the kind of property for which they could be forced to pay a dollar if the case were brought into a court. In such circumstances union among the abutters was a shadowy and distant chance. *New*

York City v. *Sage*, 239 U. S. 57, 61; *Olson* v. *United States*, 292 U. S. 246, 256. "What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots." *New York City* v. *Sage*, *supra*, at p. 61. Discordant voices among the group would surely have been raised in protest if an attempt had been made by amicable treaty to get rid of the spur at the value put upon it by the railway. Perhaps the abutters would have paid something. But how much would it have been? The courts below have found in the evidence no basis for the belief that the price would have exceeded the value of the easements as judicially ascertained at the time of acquisition. 229 App. Div. at p. 629; 265 N. Y. at p. 181. We cannot say that this was error. Still less can we say that some other and higher figure was established with such persuasive power that the Constitution of the United States has been flouted in the refusal to accept it.

2. Objections are made by the petitioners to the valuations of the structure, the franchise, and the public easements in the highway.

The structure was appraised as junk, the city having undertaken to bear the cost of removal. Such an appraisal might be too low were it not for the award for the private easements. To realize the value of those easements, an abandonment of the spur was necessary. "The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street." 265 N. Y. at p. 181. The structure in the circumstances had no value except as scrap.

The franchise was without value for reasons already stated, or so the triers of the facts might hold without

departing from the restraints of the Constitution of the nation.

With the value of the franchise gone, the public easements in the street, as distinguished from the private ones, had a worth that was merely nominal, at least for any showing to the contrary in the pages of this record.

Other objections have been considered without inducing a conviction that the petitioners have been the victims of any arbitrary rulings.

The judgment is *Affirmed.*

The CHIEF JUSTICE took no part in the consideration or decision of this case.

AERO MAYFLOWER TRANSIT CO. *v.* GEORGIA PUBLIC SERVICE COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 586. Argued April 4, 1935.—Decided April 29, 1935.

1. A state statute imposing upon private carriers operating motor vehicles in the business of transporting persons or property for hire over any public highway in the State an annual license fee of $25 per vehicle for the maintenance of the highways, *held* not unconstitutional in its application to a carrier operating such vehicles in interstate commerce. P. 289.
2. Imposition of a uniform state license fee of so much for each vehicle used by private carriers on the state roads does not create an undue burden upon interstate commerce as applied to an interstate carrier merely because that carrier has less occasion to use those roads than local carriers have. One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may. P. 289.
3. A Georgia statute (Ex. Sess., 1931, p. 99) imposing an annual license tax on private carriers by motor vehicle of $25 per vehicle using the state highways, the proceeds of which tax are applied to the upkeep of state highways, does not violate the equal protection clause of the Fourteenth Amendment by exempting: